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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 874

FRANK ANDREWS

Petitioner,

vs.

THE STATE OF OHIO

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO AND BRIEF IN SUP-
PORT THEREOF.**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 874

FRANK ANDREWS

vs.

Petitioner,

THE STATE OF OHIO,

Respondent

PETITION FOR A WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

(a) Summary Statement of Matter Involved

The Grand Jury of Hamilton County, Ohio, at the January, 1945 term of court returned an indictment reading as follows:

“That Frank Andrews, alias Frank Andriello, alias Screw Andrews on or about the 29th day of December in the year nineteen hundred forty-four at the County of Hamilton and State of Ohio, aforesaid, *did unlawfully promote and carry on a scheme of chance known as ‘policy’ or ‘number game’*, he, the said Frank Andrews, alias Frank Andriello, alias Screw Andrews, then and there being a second offender by reason of his having been convicted of promoting a scheme of chance in violation of Section 13064-1 of the General Code of Ohio on the twentieth day of September in

the year nineteen hundred and forty-four in the Municipal Court of the City of Cincinnati, Ohio, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

On the back of said indictment was endorsed:

“Indictment for Vio. Sec. 13064-1 G. C.”

The petitioner filed a motion to quash and a demurrer to said indictment on the grounds that said statute was unconstitutional in that it deprived him of his constitutional rights and denied due process under the Fourteenth Amendment of the United States Constitution in that said legislation was unconstitutional as is hereinafter shown.

Said motion and demurrer were overruled by the Trial court and on the trial of said indictment the jury returned a verdict finding the defendant guilty at which time the court passed sentence of one to seven years in prison in the Penitentiary and a fine of One Thousand Dollars.

(b) Reason Relied On for the Allowance of the Writ

Petitioner contends that the trial court should have granted his motion to quash and the demurrer to the indictment. The indictment charged that the defendant “did unlawfully promote and carry on a scheme of chance * * *.” The Prosecuting Attorney noted on the back of the indictment “vio. sec. 13064-1 G. C.”

Said Sections 13064 and 13064-1 read as follows:

Section 13064—PENALTY FOR PROMOTING LOTTERY OR SCHEME OF CHANCE.

Whoever for his own profit, establishes, opens sets on foot, carries on, promotes, makes, draws or acts as “backer” or “vender” for or on account of a lottery

or scheme of chance, by whatever name, style or title denominated or known, whether located or to be drawn, paid or carried on within or without this state, or by any of such means, sells or exposes for sale anything of value, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than six months.

SECTION 13064-1—PENALTY FOR ESTABLISHING, PROMOTING, ETC. "NUMBERS GAME," ETC.

Whoever establishes, opens, sets on foot, carries on, promotes, makes, draws or acts as "backer" of "vender" for or on account of a scheme of chance known as "policy", "numbers game", "clearing house" or by words or terms of similar import, whether located or to be drawn, paid or carried or within or without this state, or by any of such means, sells or exposes for sale anything of value shall, upon first conviction thereof, be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than six months nor more than ten months, and upon the second or succeeding convictions shall be fined not less than five hundred dollars nor more than one thousand dollars and imprisoned in the penitentiary not less than one year nor more than seven years.

We now direct the Court's attention to the fact that Section 13064 and 13064-1 as applied to the present defendant are unconstitutional. These sections of the Code along with Section 13063 and 13063-1 were all included in the Substitute House Bill No. 384 which was passed by the House of Representatives and sent to the Senate on April 29th, 1943. These bills were amended in the Senate by inserting the words "for his own profit" into Sections 13063 and 13064 and in such amended form were passed by the Senate on May 26th, 1943, and concurred in by the House on May 28th, 1943, and approved by the Governor on June 22nd, 1943, becoming effective September 21st,

1943 (See 120 Ohio Senate Journal 517, 647, 714 and 754).

From the Legislative History it is evident that Sections 13064 and 13064-1 were passed at one and the same time as one complete Legislative Act and not 13064-1 as an additional, amendment or substitution for 13064.

With that idea in mind we examine the two sections and find that 13064 has the following language:

“whoever * * * promotes * * * scheme of chance by whatever name, style or title denominated or known * * *.”

We then look at Section 13064-1 which provides:

“Whoever * * * promotes * * * scheme of chance known as ‘policy’ and ‘numbers game’ or by words or terms of similar import.”

In the first Section provision is made for a fine of some \$50.00 to \$500.00 and imprisonment from ten days to six months. In the next Section provisions are made for a fine \$50.00 to \$500.00 and imprisonment of not less than six months or more than ten months and upon a second conviction from \$500.00 to \$1,000.00 fine and not less than one year or more than seven years in the penitentiary.

In the instant case the accusation made against the defendant is just as fully covered under Section 13064 as it is under Section 13064-1. The question then presented is where two sections of the code are passed simultaneously each of which describes a certain act of conduct as constituting an offense and the penalty is more severe in one than in the other, can such legislation be sustained when in effect it permits the prosecuting attorney to discriminate against a defendant and thus make the law unequal in its application?

The term covered in Section 13064 “scheme of chance by whatever name, style or title denominated or known”

certainly includes the terms used in Section 13064-1. "Scheme of chance known as 'policy' 'numbers' game, clearing house or by words or terms of similar import.

The legislation is defective for another reason, in that while both Sections describe the same offense, under Section 13064 the State is required to prove that the Act was committed "for his own profit", which term was inserted by the Legislature when it was in the Senate, but a similar term is not included in Section 13064-1. If the Act the defendant was charged with was included in the offense described under Section 13064 then under said Section the State would be required to prove that such Act was done "for his own profit" while under Section 13064-1 if selected by the Prosecuting Attorney the burden of the State would be made easier.

It is evident that the offense charged in the indictment, if it be an offense, is covered by the first section, that is 13064, and is fully described therein.

The last Section 13064-1 undertakes to cover the same offense with a greater penalty.

Where the Legislature passes two sections defining and establishing the same crime and imposes a lighter penalty in one and a heavier penalty in the other, it deprives the accused of his rights when the Prosecuting Attorney in effect is given the choice of under what statute he will prosecute the defendant. It permits the Prosecuting Attorney to discriminate in favor of or against an accused. It, therefore, makes the legislation unequal in its application to persons and results in a deprivation of the accused's constitutional rights and a denial of due process under the 14th Amendment of the United States Constitution. (In re: Cooper, 134 O. S. 40, 11 O. O. 442).

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of

this Honorable Court directed to the Supreme Court of Ohio commanding that court to certify and send to this Court for its review and determination on the day therein named a full and complete transcript of the record and all proceedings in the case numbered and entered on its docket as No. 30487 The State of Ohio, plaintiff-appellee v. Frank Andrews, defendant-appellant, and that the said judgment entered by it on October 31, 1945 and the order of said court overruling the application for a rehearing entered on November 21st, 1945 wherein it overruled a Motion to Certify the record to the court for review and dismissed the appeal filed as a matter of right, may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

FRANK ANDREWS,
By SOL GOODMAN,
By WM. F. HOPKINS,
Counsel for Petitioner.

